FOR ARGUMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-528

FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

v.

PACIFICA FOUNDATION,

Respondent.

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICUS CURIAE COMMITTEE FOR OPEN MEDIA

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BRIEF OF AMICUS CURIAE COMMITTEE FOR OPEN MEDIA, SAN FRANCISCO CHAPTER

INTEREST OF AMICUS CURIAE

Amicus curiae is a citizens' group in the San Francisco, California area which has participated in licensing and rulemaking proceedings before the Federal Communications Commission. It represents the interests of citizens as affected by broadcasting stations, and has a strong interest in promoting robust, wide-open debate over broadcast facilities. The Commission's action here thwarts or

discourages such debate, for reasons developed within.

PRELIMINARY STATEMENT

The FCC has declared that certain language cannot be employed on the broadcast medium even if it has serious value in context unless the number of children in the audience is reduced to an unspecified minimum.1/ Thus, as discussed

1/ In its February 21, 1975 order (hereinafter referred to as "Order") the Commission recognized that, "In order to avoid the error of overbreadth, it is important to make it explicit whom we are protecting and from what." (App. 14.) Yet, now it professes to be "puzzled" that an "ad hoc ruling on specific facts" should be examined to determine if the statutory definition purportedly applied was overbroad. (FCC Brief at 41, n. 30.) Instead it sub silentio asks the Court to hold it immune from the well-established principles of cases such as Gooding v. Wilson, 405 U.S. 518 (1972), requesting this Court for a license to apply, modify and extend its definition of indecency on a roving ad hoc basis. (Id. at 42-43.) Such maneuvers highlight the Commission's own confusion as to the meaning of indecency, and underscore the perils of divorcing the concept of indecency from obscenity. If precision is to remain the touchstone when First Amendment rights are at stake, the Commission's application for a roving license to censor must be denied.

below, the Commission would not permit major award-winning plays and other unquestionably valuable material to be presented on prime-time television. This the Commission would justify by sweeping references to the "special characteristics" of the broadcasting medium and by inept analogy to the law of nuisance.

"Channeling" valuable speech to times when millions do not watch or listen denies rights to both speakers and audiences. Thus the relevant analogy in the case is to Butler v. Michigan, 352 U.S. 380 (1957), not to Young v. American Mini Theaters, Inc., 96 S.Ct. 2440 (1976). The plurality opinion in Young holds that time, place and manner regulations of expression based upon content can survive First Amendment scrutiny if, but only if: (1) the regulations are designed to further substantial state interests beyond the fact that the materials are considered offensive or embarrassing,2/ and (2) the

2/ "The City Council's determination was that a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films. It is this secondary effect which this zoning ordinance attempts to avoid, not the dissemination of 'offensive' speech. In contrast, in Erznoznik...the justifications offered by the city residents rested primarily on the city's intent in protecting its citizens from exposure to unwanted 'offensive' speech." 96 S.Ct. at 2452, n. 34.

regulations do not restrict the access of distributors or exhibitors to the market or, conversely, do not restrict the viewing public's access to the regulated material.3/ Although the FCC seeks refuge in Young, it asserts no interest other than that the material is offensive to justify a regime which would greatly limit authors' and producers' access to the marketplace while simultaneously limiting the rights of tens of millions of persons whose viewing is confined to the early evening hours.4/ As in Butler, this Court should hold that adults cannot be limited to fare fit only for children.

3/ "There is no claim that distributors or exhibitors of adult films are denied access to the market, or, conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare. Viewed as one entity, the market for the commodity is essentially unrestricted." 96 S.Ct. at 2448. "The situation would be quite different if the ordinance had the effect of suppressing or greatly restricting access to lawful speech." Id. at 2453, n. 35.

4/ Indeed, during the early evening hours, most children are supervised and the interests asserted by the FCC are correspondingly weak.

Perhaps even more serious is the assertion of purging "offensiveness" as an independent government interest. Offensiveness as a concept has been limited previously to two situations in First Amendment law. First, it has served to limit the sweeping language of Roth v. United States, 354 U.S. 476 (1957), i.e., even dominantly prurient material is protected if it is not patently offensive. Second, it has allowed individuals protection from receiving materials they regard as offensive provided that the enforcement of their rights does not deny the right of others to receive the materials. Rowan v. U.S. Post Office Dept., 397 U.S. 728 (1970); Martin v. City of Struthers, 319 U.S. 141 (1943). Indeed, in the absence of fighting words, material profoundly offensive to many has been routinely protected. Cohen v. California, 403 U.S. 15 (1971); Gooding v. Wilson, supra; Terminiello v. City of Chicago, 337 U.S. 1 (1949). If offensiveness were to be unshackled, majority tastes would replace the First Amendment, and our nation's deep commitment to "robust and wide-open" speech would be reduced to an empty slogan.

The Constitution cannot be cast aside by sweeping references to the special characteristics of the broadcast medium. Such characteristics are relevant to a determination of the prurience, the offensiveness, and perhaps the value of broadcast material; they do not justify the unprincipled abandonment of carefully developed First Amendment principles.

SUMMARY OF ARGUMENT

As the briefs of the parties fully set forth the proceedings below, amicus will not repeat them here. Briefly stated, on February 21, 1975, responding to a complaint against a broadcast by respondent's Station WBAI, the Federal Communications Commission issued an order defining the term "indecent" as used in 18 U.S.C. §1464. The District of Columbia Circuit Court of Appeals reversed the Commission's Order, finding it overbroad and vague and a violation of the Commission's duty to avoid censorship under 47 U.S.C. §326.

The Commission's Order drastically restricts the broadcast of nonobscene material, prohibiting it from the air when children are likely to be in the audience, and only hinting that a less restrictive standard might be invoked when the number of children in the broadcast audience is reduced to a minimum. Under the Order, programs containing "indecent" language cannot be broadcast when children are in the audience even if the programs have serious literary, artistic, or political value. The merits of the programs are irrelevant. Moreover, as demonstrated by the Carlin broadcast itself, material need not appeal to the prurient interest of anyone to be subject to the Commission's restriction.

Although the Commission emphasizes that its Order is not a complete prohibition of "indecent" matter but rather a "channeling" of that material to certain

time slots, its ban is absolute with respect to many members of the broadcast audience who watch TV or listen to the radio only during the afternoon and early evening hours. The proscription is also absolute with respect to the many broadcasters who operate only during hours when children are likely to be in the broadcast audience.

Even accepting the Commission's characterization of its Order as mere "channeling", as a time, place, or manner regulation based on the content of expression, the Commission's Order can survive First Amendment scrutiny only if it furthers special and overriding governmental interests. None of the justifications advanced by the Commission are sufficiently compelling to allow such an abridgment of First Amendment rights.

"Indecent" language would include language that is neither obscene as to adults nor obscene as to children. Parents have a right to raise their children as they see fit, yet the Commission takes that right away from parents by removing many programs of unquestioned merit from the air during prime child-viewing hours. Further, under the veil of protecting unsupervised children, the Order reduces much of the adult population of this country to viewing and listening to only that which the Commission finds appropriate for children.

Neither is the fact that broadcasts are received by a "captive" audience in the home a reason to set new Constitutional

priorities for broadcasters. Members of the broadcast audience choose to bring the medium into their home, and they are free to turn the radio or TV off at any time.

Finally, by cutting the notion of prurience out of its definition of indecency, the Commission has defeated the fundamental purpose of the obscenity doctrine, to protect society from dangerous antisocial behavior that might be generated by commerce in prurient offensive matter. Standing alone, the Commission's unsupported assertion that offensive language debases and brutalizes people is not justification enough for carving out a new exception to the protections of the First Amendment.

I. IT IS UNCONSTITUTIONAL FOR THE GOVERNMENT TO PREVENT BROADCAST LICENSEES FROM PRESENTING MATERIAL OF SERIOUS LITERARY, ARTISTIC, POLITICAL, OR SCIENTIFIC VALUE TO THOSE WHO WATCH OR LISTEN WHEN CHILDREN ARE IN THE AUDIENCE.

A. The Commission's Prohibition of Broadcasting Material of Serious Literary, Artistic, Political, or Scientific Value Is Absolute with Respect to Many Broadcasters and Members of the Broadcast Audience, and, in Any Event, Is an Impermissible Restriction of Protected Speech on the Basis of Content.

Since Roth v. United States, 354 U.S. 476 (1957), this Court has held that the First Amendment protections of freedom of speech and press do not extend to obscene material. Kois v. Wisconsin, 408 U.S. 229 (1972); United States v. Reidel, 402 U.S. 351, 354 (1972); Miller v. California, 413 U.S. 15, 23 (1973); Paris Adult Theater I v. Slaton, 413 U.S. 49, 69 (1973). Alert to the dangers of excluding a category of speech from the shelter of the First Amendment, the Court has defined obscenity to include only that material which, when taken as a whole under contemporary community standards (1) appeals to the prurient interest; (2) portrays in a patently offensive way sexual conduct specifically defined by the applicable law, and (3) lacks serious literary, artistic,

political or scientific value. Miller v. California, supra, at 24.

The FCC, relying principally on 18 U.S.C. §1464, which makes it a crime to broadcast "indecent language," defines "indecent" as referring to language which "describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs" when broadcast at a time when children are in the audience. (App. 15, 16, 17.) The Commission states that "indecent language," as defined in the Order,

> "is distinguished from obscene language in that it (1) lacks the element of appeal to the prurient interest...and that (2) when children may be in the audience, it cannot be redeemed by a claim that it has literary, artistic, political or scientific value."

In a "clarifying" order issued March 25, 1976 (App. 15), the Commission states that the indecency standard will be lifted where two circumstances are present: (1) where public events likely to produce offensive speech are covered live, and (2) where there is no opportunity for journalistic editing. In addition, when the number of children in the audience is "reduced to a minimum," indecent language "might conceivably" be allowed where sufficient warnings are given to consenting adults and in the context used the

language has serious literary, artistic, political or scientific value. (App. 43, 44.)

To comprehend the enormous scope of the Commission's new standard, it is helpful to consider some of the material it would restrict.5/ The Commission's Order abridges much political speech, such as many of the Nixon tapes, or a description of the events which led to the resignation of Earl Butz, former Secretary of the Department of Agriculture. Parts of the Bible could not be read.6/ Many award-winning plays would be barred, such

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5/ In this connection we note only matter in which one of the seven words objected to in the Carlin broadcast is present. While those were the only words specifically mentioned in the Commission's Order, there are many other words which would fit the Commission's general description of "indecent" language, presumably outlawing a vast number of additional works from the air. The problem of the vagueness of the Commission's standard, whereby words such as "shit," "piss," and "tit" are "indecent," but "fart," "turd," and "twat" (which were also mentioned in the Carlin broadcast but not commented upon by the FCC) apparently are not, is discussed in respondent's brief and is outside the scope of this brief.

6/ See, e.g., I Kings 14:10 and II Kings 9:8 (King James version).

as "Equus," "The River Niger," "Short Eyes," and "The Great White Hope." Most ironically, it would even prohibit the broadcast of its own decision barring such words.

The Commission attempts to justify the new indecency standard by terming it "channeling" rather than an actual prohibition. (App. 14.) The apparent basis for the Commission's "channeling" label is its statement in the Order that when the number of children in the audience is reduced to a minimum, indecent language "might conceivably" be allowed. (App. 15-16, 18, 43, 44.) However, such a characterization cannot disguise the effect of the Order, which is to prohibit altogether the broadcast of a wide range of material with respect to many broadcasters and members of the public.

There is no time other than the very early morning hours, when most broadcasters do not operate and most audience members do not listen, that the number of children in the broadcast audience is "reduced to a minimum."7/ For example, as the Court of Appeals noted, there are over a million children between the ages of two and eleven in the television

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7/ The extreme vagueness of the terms "children" and "at a minimum" raises constitutional questions which respondent has addressed in its brief to this Court and which are beyond the scope of the brief of amicus.

audience until 1:00 A.M.8/ That court concluded that "as long as such large numbers of children are in the audience the seven words noted in the Order may not be broadcast." (App. 53.)

Regardless of the hour when the number of children in the audience is thought to be "reduced to a minimum," the Commission's ban is absolute with respect to a large proportion of the broadcast audience,9/ including (1) adults who watch TV (or listen to the radio) only during the early evening hours; (2) children who watch TV only during the early evening hours; and (3) parents who want their children to be able to view the prohibited

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8/ Statement of John A. Schneider before the House Subcommittee on Communications, July 15, 1975, p. 9. The Commission's statistics show that in Washington, D.C., teenagers compose 14.1% of the TV audience at 8-9 P.M. and 10.9% at 11 P.M.-12 A.M.; and in another survey of New York and Los Angeles, children aged 11-17 represent 13% of the audience from 9-11 P.M., and those aged 6-11 constitute 5%. See Eastern Educational Radio (WUHY-FM), 24 FCC2d 408, 411, n. 6 (1970).

9/ Using January, 1974 as a sample month, Nielsen estimates that about 70% of television households were watching 9-10 P.M., about 46% at 11 P.M., and 25% at 12 A.M. "A peak is reached generally between 8-10 P.M. followed by a sharp decline at the end of the evening." Nielsen Television, 1975 at p. 7.

material, where the children watch TV only during the early evening hours. The Commission's prohibition is also absolute with respect to many broadcasters; for example, roughly one-half of the approximately 4,500 AM radio stations are daytime only stations.

Furthermore, this Court has long held that restrictions on the time, place or manner of expression based on its content are impermissible unless enacted to further substantial governmental interests. Young v. American Mini Theaters, supra; Erznoznik v. City of Jacksonville, supra; Police Dept. v. Mosley, 408 U.S. 92, 95-96 (1972); Hudgens v. NLRB, 424 U.S. 507 (1976). As discussed above in the Preliminary Statement, the FCC's interest in purging the air of offensive language is clearly not sufficient to sustain its prohibition. While the Commission correctly points to certain characteristics that distinguish broadcasting from other media, those qualities cannot serve as the basis for such a drastic reduction of First Amendment rights of both broadcast licensees and broadcast audiences.

B. The Justifications Advanced by the Commission Are Not Sufficient to Allow Restriction of the First Amendment with Respect to the Broadcast Media.

1. The Presence of Unsupervised Children in the Broadcast Audience Is Not a Reason to Allow Curtailment of First Amendment Protection of Broadcast Material.

Primary among the reasons given by the Commission in support of its Order is the concern that unsupervised children will be exposed to language which many parents would regard as inappropriate for their children to hear. The Commission reasons that the First Amendment does not apply in the same manner to broadcasters as to all other media, largely because of the likelihood of unsupervised children being present in the broadcast audience. To be sure, the Government has a special interest in the well-being of children and "...can adopt more stringent controls on communicative materials available to youths than those available to adults." Erznoznik v. City of Jacksonville, 422 U.S. 205, 212 (1975). To that end, this Court adopted a "variable obscenity" standard in Ginsberg v. New York, 390 U.S. 629 (1968), adapting the then-applicable obscenity standard of Roth v. United States, supra, and Memoirs v. Massachusetts, 383 U.S. 413 (1966), to children by permitting the prurient appeal of

material to be assessed in terms of the sexual interests of minors. While the effect of Miller v. California, supra, upon the Ginsberg formulation has yet to be determined by this Court, "[i]t is clear, however, that under any test of obscenity as to minors...to be obscene 'such expression must be, in some significant way, erotic.' Cohen v. California, 403 U.S. 15, 20 (1971)." Erznonik v. City of Jacksonville, supra, at 213, n. 10.

The Carlin broadcast was in no way erotic; indeed, the Commission frankly states that appeal to the prurient interest, of either children or adults, is not a requisite of indecent language under the new formulation. (App. 15.) Thus, the Commission's Order, stemming principally from a concern for protection of children, prohibits broadcasting language obscene as to no one, neither adults or children. The result is an anomaly whereby a child cannot listen to the Carlin show over the radio but is free to buy a record or book containing the same language.10/ In fact, children are free to buy materials utterly without redeeming literary, artistic, political or social

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10/ In this respect, the Commission's reliance upon Capital Broadcasting Co. v. Mitchell, 333 F.Supp. 582 (D.D.C. 1971), aff'd sub nom Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972), in which the District Court upheld the Commission's ban on cigarette advertising, is misplaced because cigarettes cannot be sold to minors in most states. (See FCC Brief at 36.)

value so long as the use of offensive language is not erotic.

Further, children can even buy matter that does appeal to their prurient interest as long as it does not lack serious literary, artistic, political or social value. But the Commission's action would forbid them from listening to or viewing works of unquestioned artistic, or political or educational merit. This result is particularly anomalous in view of the fact that because the television and radio are in the home, parents, particularly in the early evening hours, can supervise and select the material that their child may view more easily than they can control what materials the child buys at a store or acquires from a friend. The problem of children obtaining access to obscene or indecent material against a parent's wishes is certainly a serious one, but no more troublesome with respect to broadcast matter than printed matter.

The Commission's Order would thus be a clear violation of the First Amendment rights of children in the broadcast audience who are prevented from receiving "indecent" matter which is not obscene. As this Court stated in Erznoznik, supra, at 213-214:

> "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images

that a legislative body thinks unsuitable for them."

See also, Carey v. Population Services International, 97 S.Ct. 2010, 2025 (1977).

Equally important, the Commission's action would violate the rights of adults to receive material prohibited by the Order. As the statistics cited above demonstrate, many adults watch television and listen to the radio only during hours when large numbers of children are in the broadcast audience. As to those adults, the Commission is forbidding presentation over the broadcast media of countless programs and works of great value. The millions of people who rely solely or principally on the broadcast media for their education and entertainment will be denied access altogether to many artistic works as well as news broadcasts11/ and other valuable programs.

Such a restriction is even more offensive than that struck down by this Court in Butler v. Michigan, supra. In that case the challenged staute forbade the publication, sale or distribution of printed material "tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of

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11/ A large proportion of news and public affairs broadcasts are not broadcast live but are taped, and apparently would not fall within the exception to the indecency standard presented in the Commission's "clarifying" order. (See App. at 43.)

morals of youth," 352 U.S. at 381, a much narrower class of material than that prohibited by the Commission's Order in the instant case. In finding that statute unconstitutional, the Court stated,

> "The State insists that, by...quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig....
>
> "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual...that history has attested as the indispensable conditions for the maintenance and progress of a free society." 353 U.S. at 383-384.

The Commission must not be permitted to reduce the adult population of this country to viewing and listening to only that which the Commission finds appropriate for unsupervised children. Surely the Commission cannot forbid dissemination to both adults and children over the broadcast media of the same material that

could not constitutionally be kept from them if it were in a printed form.12/

The Commission cites Wisconsin v. Yoder, 406 U.S. 205, 214 (1972), and the cases cited therein for the proposition that "[the] parental interest [in raising children as the parent sees fit] has 'a high place in our society.'" (App. 14.)

12/ It is ironic that the Commission relies so heavily upon the prospect of unsupervised children watching or listening to offensive language broadcast in the home to distinguish the broadcast media from the printed media. In Paris Adult Theater I v. Slaton, supra, this Court made note of evidence that, although most pornography may be bought by adults, "the heavy users and most highly exposed people to pornography are adolescent females (among women) and adolescent and young adult males (among men)." 413 U.S. 49, 58, n. 7, citing The Report of the Commission on Obscenity and Pornography 40o (1970). Despite the habitual acquisition by children of material not legally available to them, the Court has still found it inappropriate to prohibit this material altogether merely to protect children. A fortiori, the Court should not prohibit presentation on the broadcast media of material just to protect the unsupervised children who might be in the audience.

Yet, the Commission then purports to act in loco parentis, in that by banning offensive language from the air, it takes over the parents' job and protects children against hearing what it deems improper language. However, as Chief Judge Bazelon points out in his concurring opinion below, Yoder and the earlier cases of Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1944) and Pierce v. Society of Sisters, 268 U.S. 510 (1925) hold that parents, not the Government, have the right to make certain decisions regarding the upbringing of their children. The Commission's Order would fly in the face of these decisions by placing the power of censorship in the hands of Government rather than parents. Parents who desire their children to be able to view or listen to the many programs with literary, artistic, political or social value that are banned by the Commission's Order, or indeed any program containing "indecent" language, are denied that right in violation of Yoder, Pierce, and Prince.13/

13/ In this respect, the instant case is distinguishable from other cases in which the Court has upheld a restriction of the dissemination of material to children. See, e.g., Ginsberg v. New York, supra. Where the subject of restriction is printed material, parents are free to purchase the material for their children if they so desire, whereas parents who want their children to see programs covered by the Commission's Order will be denied all access to such programs.

2. Other Justifications Given by the Commission for Denying the Broadcast Media the Same Constitutional Protection Afforded to Other Media are Insufficient.

(a) Scarcity of Spectrum Space.

Another reason given by the Commission for treating broadcasting specially is that "there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest." (App. 13.) This argument, based on Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), is answered fully by Chief Judge Bazelon's concurrence in the judgment below. (See App. at 89.) Amicus would add only that the harmony of all the First Amendment interests involved in the case at hand is even more complete than Judge Bazelon noted. Whereas in Red Lion the First Amendment rights of people desiring to use the broadcast media to disseminate information weighed against the right of broadcasters to be free from content regulation by the Government, in the instant case the rights of such people are in harmony with both broadcasters' interest in freedom from Government control and the interests of the broadcast audience in selecting from among a broad range of programs. Therefore, none of the compelling interests that in Red Lion made the Court uphold the constitutionality of the personal attack and political editorializing portions of the fairness doctrine would justify

upholding the Commission's Order in the instant case.

(b) Captive Audience in the Home.

Another basis for the Commission's Order is the fear that radio and television broadcasts come into the home, where they are sampled in a "smorgasbord" manner, and thus that they may constitute an unwarranted "...intrusion into the home of unwelcome views and ideas..." (citing Cohen v. California, supra). (App. 12, 16.) In Cohen, this Court stated,

> "The ability of the government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is... dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." 403 U.S. at 21.

But the Court's decisions demonstrate clearly that no such invasion is taking place at the hands of the broadcasters. In both Erznoznik, supra, and Cohen, supra, this Court held that "the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.' Cohen v. California, supra, at 21." 422 U.S. at 210-211. Unlike "raucous emissions of sound trucks blaring

outside...residences," which have been held an intolerable invasion of privacy,14/ a television or radio is voluntarily brought into the home and can easily be turned off. See Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974)(quoting Packer Corp. v. Utah, 285 U.S. 105 (1932), "The radio can be turned off, but not so the billboard or street car placard.")

Those who were listening to WBAI before the Carlin monologue was broadcast were warned that the program included sensitive language; thus they could not constitute a "captive audience." The Commission's concern lies with those who unwittingly turned to WBAI in the middle of the monologue and were subjected to offensive language without any warning. But the concept of an "unwilling listener" is inherently contradictory in the case of a television or radio in one's own home, since the listener can readily tune to another station. Nevertheless, to protect that "unwilling listener" from this momentary annoyance, the Commission totally cuts off the ability of the station to broadcast, and of many other listeners to receive, serious literary, artistic, political and scientific presentations. That is precisely what this Court warned against in Cohen and Erznoznik.

14/ Cohen v. California, supra, at 21, referring to Kovacs v. Cooper, 336 U.S. 77 (1949).

Finally, the Commission's reliance on Rowan v. United States Post Office Department, supra, is misplaced. Rowan upheld the constitutionality of a law permitting an addressee to take his name off mass circulation mailing lists. In the instant case, the Government has made the choice that Rowan left to the addressee, by declaring that even the willing listener cannot receive the material.

In sum, no justification put forward by the Commission is sufficient to allow forbidding the presentation over the broadcast media of material protected by the First Amendment. Without making light of what is admittedly a serious problem for parents, amicus respectfully submits that the sweeping prohibition of material of serious literary, artistic, political and scientific value is not an appropriate, nor constitutional, solution. The possibility that a few children will hear language offensive to some but not obscene is insufficient to justify the blanket denial to broadcasters of the right to present, and to both adults and children the right to receive, a broad range of interesting and educational material.

II. THE COMMISSION'S INDECENCY STANDARD, BY DIVORCING PATENT OFFENSIVENESS FROM PRURIENCE, UNDERCUTS THE FUNDAMENTAL PURPOSE OF THE OBSCENITY EXCEPTION TO THE FIRST AMENDMENT AND IS THUS UNCONSTITUTIONAL.

In its Order, the Commission points out that the proposed indecency standard differs from the Miller obscenity test in two major respects: (1) when children may be in the audience, indecent language cannot be redeemed by a claim that it has literary, artistic, political or scientific value; and (2) it lacks the element of appeal to the prurient interest. The unconstitutionality of the first factor was discussed at length in Part I of this brief. Just as that aspect alone invalidates the new indecency standard, similarly, the second element standing alone is sufficient to render the Commission's ruling unconstitutional under the First Amendment.

Appeal to the prurient interest has always been central to the Court's definition of obscenity. In Roth v. United States, supra, this Court found obscene material to be that "which deals with sex in a manner appealing to the prurient interest." Finding such material to be "utterly without redeeming social importance," the Court added,

> "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as

> a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality..." Roth, supra, at 484-85 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572).

Memoirs v. Massachusetts, supra, narrowed the Roth obscenity standard to only certain material which appealed to a prurient interest. To be obscene, first, such material had to be "patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters." Second, even if material appealed to the prurient interest and was patently offensive, it still was not obscene unless it was "utterly without redeeming social value." 383 U.S. at 418. Most recently, in Miller v. California, supra, this Court further refined the Roth-Memoirs standard by requiring that, to be obscene, the work must (1) depict or describe in a patently offensive way, conduct specifically defined by the applicable state law; and (2) lack serious literary, artistic, political or social value. 413 U.S. at 24.

Thus, prurience has always been at the heart of the Court's definition of obscenity; it is the very reason for the obscenity exception to the First Amendment. Miller and the entire line of obscenity cases hold that a state may act on the

"...assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior;" and that "...crass commercial exploitation of sex" has "a tendency to injure the public as a whole, to endanger the public safety... Paris Adult Theater I v. Slaton, supra, at 63, 69 (1973). The Commission's concern, on the other hand, is entirely different--to ban "obnoxious, gutter language," which it claims "has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions." (App. 15.) While the use of such "gutter" language may be a disturbing phenomenon worthy of Government attention, the crucial issue is whether the use of such language is a social evil like hard-core pornography that the Government can properly outlaw.15/

15/ It is difficult to comprehend the logic of the Commission's construction of 18 U.S.C. §1464, even acknowledging the concerns which prompted its Order. Under the Commission's indecency standard, where language is at issue, prurience need not be shown in order to demonstrate a violation. But where photographic portrayals are at issue, offensiveness will not suffice; prurience must be shown. Non-prurient offensive pictures are thus protected; non-prurient offensive language is not. This is statutory and constitutional nonsense.

Amicus submits that there is no basis for Government to bar the use of such language on the broadcast media. These offensive words are

> "...in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated." Cohen, supra, at 25.

See Erznoznik, supra; Lewis v. New Orleans, 415 U.S. 130 (1974); Gooding v. Wilson, 405 U.S. 518, 527 (1972)(A statute that "makes it a 'breach of peace' merely to speak words offensive to some who hear them...sweeps too broadly").

Furthermore, while frequently such gutter expressions as those at issue in this case are used in a manner debasing to the language and demoralizing to society as a whole, in most of the programs that would be restricted by the Commission's Order, use of such expressions serves a real purpose. A licensee, chosen because

he is responsible and has requisite character qualifications, will permit use of such language over his facilities only when he believes it serves a valid purpose.16/ As the Commission itself states,

> "In this as in other sensitive areas of broadcast regulation the real solution is the exercise of licensee judgment, responsibility, and sensitivity to the community's needs, interests and tastes." (App. 18.)17/

Nor can the Commission shelter its Order with the argument that outlawing only a few carefully selected words is of minor consequence because the ideas behind the words can be conveyed through use of protected language. As Mr. Justice Harlan stated in Cohen, supra, at 25-26:

16/ See 47 U.S.C. §308(b); WMOZ, Inc., 36 FCC 202, 237, n. 85 (1964); Jack Straw Memorial Foundation, 29 FCC 2d 334, 354 (1971); Pacifica Foundation, 36 FCC 147 (1964); cf. Eastern Educational Radio, supra, 24 FCC 2d at 413, 418-420.

17/ Section 326 of the Communications Act, 47 U.S.C. §326, prohibiting the Commission from interfering with licensee discretion in programming, verifies that licensee responsibility is the proper means of selecting programs for broadcast, not Government censorship.

> "...we cannot overlook the fact...that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated."

Also, the possibility of the Government using censorship of particular words as a guise for banning the expression of unfavored ideas lurks all too close behind the Order's innocent appearance.

Acknowledging the dangers of banning any form of expression, the Court has long intimated that obscenity is the only category of speech that is unprotected because of its offensiveness. Miller, supra, at 19-20, 23-24, 27; Roth, supra, at 476, n. 1; Hamling v. United States, 418 U.S. 87 (1974); United States v. Twelve 200 Ft. Reels of Super 8mm. Film, 413 U.S. 123 (1973). Through its definition of "indecent language" as used in

18 U.S.C. §1464, the Commission has created a new category, one which cannot be sustained. Were the Court to find otherwise and give the term "indecent" a new meaning different from "obscene," it would undermine all of its earlier decisions that so carefully confined this exception to the First Amendment.

CONCLUSION

At bottom, in the absence of obscenity, the question is whether government or the broadcast licensee should decide what material is appropriate for a particular community and what material is not.

> "For better or worse, editing is what editors are for; and editing is selection and choice of material.... Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility--and civility--on the part of those who exercise the guaranteed freedoms of expression."
> CBS, Inc. v. Democratic National Committee, 412 U.S. 124-125 (1973).

The fact that vulgar language is rarely heard on radio or television is witness to the fact that licensees habitually program with sensitivity to the needs of their communities. If anything, licensees have been too reluctant to take chances, too afraid to offend. No need, compelling or otherwise, is present to require fundamental First Amendment reformulations.

In Sonderling Broadcasting Corp., 27 P&F Radio Reg.2d 1508, 1517 (1973) aff'd sub nom. Illinois Citizens Committee v. FCC, 515 F.2d 397, reh. denied, 515 F.2d 407 (D.C. Cir. 1975), the Commission pledged that it "will not--indeed cannot--insist that licensees abandon program material because it is offensive to some or even a substantial number of listeners." The Court should hold the Commission to this important promise if it is to be true to the principles that gave rise to the First Amendment protections of speech and press.

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